NO. 82-5373

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NATHAN BROWN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM B. HILL, JR.
Senior Assistant Attorney General
Counsel-of-Record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

VIRGINIA H. JEFFRIES
Staff Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTION PRESENTED

1.

Whether Petitioner's sentence of death violates the principles set forth by this Court in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 82-5373

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NATHAN BROWN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, Nathan Brown, was indicted by the Superior Court of Taliaferro County, Georgia, in August, 1978 for murder, possession of a firearm during commission of a crime, armed robbery, two counts of kidnapping, and aggravated assault. Following a trial by jury, Petitioner was found guilty of all charges and sentenced to consecutive death sentences for armed robbery, kidnapping, and murder, a five year consecutive sentence for possession of a firearm, and a ten year consecutive sentence for aggravated assault. Petitioner subsequently filed an appeal to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the conviction and sentence for murder and one count of kidnapping, affirmed the convictions but vacated

the death sentences for armed robbery and the other count of kidnapping, and remanded them to the trial court for resentencing to life imprisonment for the count of kidnapping and as provided by law for armed robbery; and reversed the convictions for firearm possession and aggravated assault because they were lesser included offenses. Brown v. State, 247 Ga. 298 (1981). On October 5, 1981, this Court denied Petitioner's petition for a writ of certiorari, and on November 30, 1981, denied Petitioner's petition for rehearing.

The Petitioner next filed a petition for a writ of habeas corpus in the Superior Court of Butts County, and by Order dated April 16, 1982, that Court denied Petitioner habeas relief. On June 2, 1982, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal the Order of the Superior Court of Butts County. On August 30, 1982, Petitioner filed the instant petition for writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

In its opinion affirming Petitioner's convictions, the Supreme Court of Georgia recited the facts which the jury was authorized to find at Petitioner's trial. Brown v. State, 247 Ga. 298 (1981). Petitioner Brown's case is a companion case to High v. State, 247 Ga. 289 (1981), and Ruffin v. State, 243 Ga. 95 (1979), wherein the facts and circumstances of the crime are fully set forth. The Georgia Supreme Court reviewed these facts under the standard as set out by this Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in holding that the evidence was sufficient to support Petitioner's conviction.

Henry Lee Phillips, the survivor of a murder attempt by Petitioner and co-indictees Judson Ruffin and Jose High, described for the jury the events that occurred during the late evening hours of July 26, 1976. Phillips operated an Amoco Service Station near Crawfordville, Georgia, with his eleven year old stepson, Bonnie Bullock helping him. (T. 159-161). On that evening, a car pulled into the station with three occupants. Phillips recalled the same car being in the station one or two weeks earlier. (T. 160-161, 167-168). Phillips described Petitioner's car and identified a picture of the car as the one he saw on July 26, 1976. (T. 160, 166, 168-169). The three men, one identified as Petitioner, got out of the car and one pointed a pistol at Phillips. Petitioner had a sawed-off shotgun. (T. 164, 171-173). Phillips was forced to leave the booth while money was removed from the register and a demand made for more money. (T. 162). When Phillips told one of the men that there was no more money, one of the robbers grabbed young Bonnie Bullock and told Phillips to get into the car trunk

or Phillips and the boy would be killed. Phillips complied. (T. 162, 183).

Phillips and his stepson were taken into the woods, and Petitioner struck Phillips in the stomach with the shotgun. (T. 162, 164, 167, 176, 192). Phillips and his stepson were told to lie on the ground, and one of the men mentioned getting a rope to tie them up. (T. 164). Phillips then heard shots fired. (T. 164-165). When Henry Lee Phillips regained consciousness, he discovered that his stepson was dead. Phillips himself had been shot in the temple and the wrists. (T. 165, 214).

Phillips identified a picture of Petitioner and two of the accomplices. (T. 171-173). Phillips and other witnesses identified the station's cash drawer, which was found near Sharron, Georgia, where the victims had been shot. (T. 182, 199-202, 204-207, 209). It was determined that about $288.00 was missing from the register. (T. 210, 219).

A Jackson-Denno hearing was held to determine the voluntariness of the statement made by Petitioner to police agents. (T. 311, 336). The police agents told the jury that in an interview with Petitioner, Petitioner implicated co-indictees Judson Ruffin and Jose High. (T. 359-362).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S CHALLENGE TO THE VIOLATION OF THE PRINCIPLES SET FORTH IN ENMUND V. FLORIDA, ___ U.S. ___, 102 S.Ct. 3368 (1982), IS NOT PROPERLY BEFORE THIS COURT ON THIS PETITION.

In this petition for a writ of certiorari, Petitioner seeks to have this Court review whether the imposition of the death penalty under the facts in his case violates the principles set forth in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982). Petitioner asserts, for the first time in any appellate review, that his sentence of death violates constitutional standards for capital sentencing established by the Eighth and Fourteenth Amendments, and set forth by this Court in Enmund v. Florida, supra.

Respondent asserts that as Petitioner has not previously raised this issue in any of the courts below, he is now barred from seeking a review on certiorari of this issue. Rule 17 of the Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari. This rule indicates that a review on a writ of certiorari is not a matter of right, but of judicial discretion, and the rules set out three examples that are indicative of the character of reasons for granting a review on a writ of certiorari. Each of these examples are situations where a lower court has decided a federal question. The rule sets forth no examples of a situation where a review on certiorari would be considered when the federal question has neither been presented to nor decided by a lower court.

Additionally, in Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), this Court held that unless it appears on the record that a federal question was both raised and decided in the State Court below, the United States Supreme Court's appellate jurisdiction fails.

Respondent respectfully submits that this federal question presented in this petition for a writ of certiorari has never been raised, preserved or passed upon in the Georgia Courts, and that thus, the petition for writ of certiorari should be denied for lack of jurisdiction.

II. PETITIONER'S SENTENCE OF DEATH DOES NOT VIOLATE THE PRINCIPLES SET FORTH IN ENMUND V. FLORIDA, ___ U.S. ___, 102 S.Ct. 3368 (1982).

Petitioner alleges that under the principles set forth in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), the death penalty was unconstitutionally applied to him. Specifically, Petitioner alleges that his conviction and death sentence rest solely upon a felony murder theory, and that as such, his murder conviction does not constitute an offense so outrageously or wantonly vile, horrible or inhuman so as to authorize the imposition of the death penalty.

In its decision affirming this conviction, the Supreme Court of Georgia conducted a Sentence Review and found that the evidence presented at trial substantiated and supports a finding of Ga. Code Ann. § 27-2534.1(b)(7), i.e., that the offense of murder was outrageously or wantonly vile and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim. In its opinion, the Georgia Supreme Court held that:

> "Under the evidence in this case, the appellant and his two-conspirators planned the armed robbery of the service station with the express intent to eliminate any witnesses to the crime. They kidnapped the manager of the station along with his eleven year old stepchild at gunpoint. The young boy, Bonnie Bullock, was 56" tall and weighed 70 lbs. The stepfather was placed in the trunk of the

car while the young boy rode inside the vehicle with his abductors. The appellant in his confession admitted that, as they drove the victims to an area in which they could be executed, Jose High taunted the young boy with the prospect of his own death to the point that the young boy was begging for his life. When the robbers reached the execution site, the boy's stepfather attempted to go to him, but was struck in the stomach by the butt of a shotgun weilded to the appellant. Both victims in the case were forced to lie on their faces on the ground in front of the automobile at gunpoint and were shot in the head in a cold blooded, execution fashion. According to the appellant's statement, as the three then drove away from the site, they laughed about the murder. All of the conspirators were laughing, and the appellant related to the others, 'We ain't got nothing to worry about, they're both dead.' One of the conspirators told the appellant that he put three .32 caliber bullets into the boy's head and two into the man's head. The appellant then told Jose High that he should not have cut loose with both barrels of his shogtun, as 'one should have been enough with those .32's.'"

Brown v. State, supra, at 303.

The Georgia Supreme Court concluded that, "[t]he appellant, while not the actual triggerman, was present and actively participated in all aspects of the crime, including the psychological torture of the victim," and that "this murder of the eleven year old victim was outrageously or wantonly vile, horrible or inhuman in that it is distinguishable from ordinary murders for which the death penalty is not appropriate." Brown v. State, supra, at 304.

Respondent submits that the facts of Petitioner's case regarding his participation in the crime are easily distinguishable from the facts in Enmund. The evidence established that the Petitioner was positively identified by the surviving victim of the crimes. In addition, the Petitioner made a complete and full confession. His fingerprints were found on the car identified as the vehicle used in the robbery. The Petitioner in his statement said, "Judson got .32 and walked up to the booth . . . I got out my single-barrel shotgun" and "loaded a .32 revolver with different shells in Augusta." The Petitioner was also identified by the surviving victim as having a shotgun at the time of the robbery, and at the time he was removed out of the trunk of the car and shot. Brown v. State, supra, at 301.

Respondent submits that given this set of facts, no issue has been raised as to the direct and active participation of Petitioner in the murder of Bonnie Bullock and the other crimes surrounding the murder. Contrary to Petitioner's argument, his conviction and death sentence do not rest solely on a felony murder theory. A review of the transcript of Petitioner's trial reveals that Petitioner was charged with malice murder, not felony murder. (T. 419-420). In its instructions to the jury, the trial court instructed the jury on the law of malice murder. (T. 435).

Furthermore, Respondent submits that a careful reading of Enmund clearly indicates the very limited nature of the Court's decision. Enmund received a death penalty on the basis of accomplice liability in a felony murder situation. As discussed previously, felony murder was not involved in Petitioner's case. Additionally, this Court accepted the statistics presented by the Petitioner in Enmund and stated that of the 796 inmates under sentences of death for homicide, only 16 were not physically present when the fatal assault was committed and of these 16 prisoners, only 3, including Enmund were sentenced to die without a finding that they hired or solicited someone else to kill the victim or participated in the scheme designed to kill the victim. See Enmund v. Florida, supra, at 3375-3376. Therefore, according to these statistics cited by this Court, there are arguably only 3 persons on death row, nationwide, who might possibly be affected by the decision of this Court in Enmund.

Respondent asserts that because of the statistics upon which this Court relied, it appears that except for those cases delineated by the Court, the Court was announcing a prospective rule to prevent the imposition of the death penalty in those cases involving felony murder, where no intent to kill was shown on behalf of the accomplice to the underlying felony.

The case before this Court is factually and legally distinguishable from that case in Enmund v. Florida, and therefore, Respondent respectfully submits that this issue does not warrant review by this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of the Petitioner, Nathan Brown.

Respectfully submitted,

WILLIAM B. HILL, JR.
Senior Assistant Attorney GEneral
Counsel-of-Record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

VIRGINIA H. JEFFRIES
Staff Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to:

Ronnie K. Batchelor
4179 Memorial Drive
Decatur, Georgia 30032

This 1st day of October, 1982.

Virginia H. Jeffries
VIRGINIA H. JEFFRIES

NO. 82-5373

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NATHAN BROWN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, WILLIAM B. HILL, JR., A Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on October 1, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition in the above-styled case.

WILLIAM B. HILL, JR.

Sworn to and subscribed
before me this ____ day
of September, 1982.

NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires June 11, 1986